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U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT

22 CFR Parts 202, 205, 211 and 226

RIN 0412-AA52

Participation by Religious Organizations in USAID Programs

AGENCY: U.S. Agency for International Development (USAID)

ACTION: Proposed rule.

SUMMARY: This rule proposes to implement Executive Branch policy that, within the framework of constitutional guidelines, religious (or “faith-based”) organizations should be able to compete on an equal footing with other organizations for USAID funding.

This proposed rule would revise USAID regulations pertaining to the award of grants, cooperative agreements and contracts awarded for the purpose of administering grant programs to ensure their compliance with this policy and to clarify that faith-based organizations are eligible to participate in programs on the same basis as any other organization, with respect to programs for which such other organizations are eligible.

DATES: Comments must be submitted by **[Insert date 60 days after date of publication in the FEDERAL REGISTER.]**

ADDRESSES: Interested persons are invited to submit comments regarding this proposed rule to the: Center for Faith Based and Community Initiatives, U.S. Agency for International Development, Room 3.09-22, 1300 Pennsylvania Avenue, NW, Washington, DC 20523. Communications should refer to the “proposed rule”. You may submit your comments by fax to 202-216-3351 or by email to fbcf@usaid.gov. A copy

of each communication submitted will be available for inspection and copying between 8:30 a.m. and 5:30 p.m. at the above address.

FOR FURTHER INFORMATION CONTACT: Michael Magan, Director, Center for Faith-Based and Community Initiatives, USAID, Rm. 3.3.30, 1300 Pennsylvania Ave., NW, Washington, DC 20523; telephone: (202) 712-4080 (this is not a toll free number).

SUPPLEMENTARY INFORMATION:

I. Background

Religious (or “faith-based”) organizations make an important contribution to the delivery of humanitarian and economic assistance in much of the world. Faith-based organizations acting alone or in partnership with local and national governments, community-based organizations, institutions of higher education, and other private organizations do much good work to meet the pressing needs of countries and their citizens, consistent with the objectives of the U.S. foreign assistance program.

Faith-based non-profit organizations have been implementing humanitarian and development activities for USAID for decades. Nevertheless, USAID seeks to further facilitate the contribution of faith-based and community organizations to increase the reach and effectiveness of its programs. We believe this will strengthen the effort, given priority in the national security strategy of the United States, to respond to the humanitarian and economic development needs of countries world-wide.

President Bush has directed Federal agencies, including USAID, to take steps to ensure that Federal policy and programs are fully open to faith-based and community groups in a manner that is consistent with the Constitution. The Administration believes that such groups possess an under-appreciated ability to meet the needs of disadvantaged

people overseas struggling to make a better life, recover from a disaster or live in a free and democratic country. The Administration believes that there should be an equal opportunity for all organizations—both religious and nonreligious—to participate as partners in Federal programs.

As part of these efforts, President Bush issued Executive Order 13198 on January 29, 2001. The Order, which was published in the Federal Register on January 31, 2001 (66 FR 8499), created Centers for Faith-Based and Community Initiatives in five Cabinet departments—Housing and Urban Development, Health and Human Services, Education, Labor, and Justice. The Executive Order charged the Centers to identify and eliminate regulatory, contracting, and other programmatic obstacles to the participation of faith-based and community organizations in the provision of social services by their Departments. On December 12, 2002, President Bush issued Executive Order 13280. That Order, published in the Federal Register on December 16, 2002 (66 FR 77145), created Centers in two additional agencies—the United States Agency for International Development and the Department of Agriculture—and charged those Centers with duties similar to those set forth in Executive Order 13198. On December 12, 2002, President Bush also issued Executive Order 13279, published in the Federal Register on December 12, 2002 (67 FR 77141). That Executive Order charges Executive Branch agencies to ensure equal protection of laws to faith-based and community groups that apply for funds to meet administer social service programs domestically and abroad. President Bush called for an end to discrimination against faith-based organizations and, consistent with the First Amendment to the United States Constitution, ordered implementation of these policies throughout the Executive Branch, including, among other things, allowing

organizations to retain their religious autonomy over their internal governance and composition of boards, and over their display of religious art, icons, scriptures, or other religious symbols, when participating in government-funded programs. President Bush directed each Executive Branch agency, including USAID, to implement these policies. This proposed rule is part of USAID's efforts to fulfill its responsibilities under these Executive Orders.

II. This Proposed Rule

A. Purpose of Proposed Rule

Consistent with the President's initiative, this proposed rule would revise USAID's regulations to ensure that there are no unwarranted barriers to the equal participation of faith-based organizations in USAID's programs. The objective of this proposed rule is to ensure that USAID's programs are open to all qualified organizations, regardless of their religious character, and to establish clearly the proper uses to which funds may be put, and the conditions for receipt of funding. In addition, this proposed rule is designed to ensure that the implementation of USAID's programs is conducted in a manner consistent with the requirements of the Constitution, including the President's Article II responsibilities to conduct the foreign affairs of the nation and to act as its sole representative in international relations.

B. USAID Regulations Amended by Proposed Rule

This rule proposes to revise in its entirety 22 CFR Part 205, Payments to and on Behalf of Participants in Nonmilitary Economic Development Training Programs. It's new title would be "Participation by Religious Organizations in USAID Programs."

This rule also proposes to amend the following USAID regulations:

1. 22 CFR Part 202, Overseas Shipment of Supplies by Voluntary Non-Profit Relief Agencies.
2. 22 CFR Part 211, Transfer of Commodities for Food Use in Disaster Relief, Economic Development, and Other Assistance.
3. 22 CFR Part 226, Administration of Assistance Awards to U.S. Non-Government Organizations.

C. Proposed Regulatory Amendments to Title 22

The revised part 205 will apply to all Federal financial assistance (including grants, cooperative agreements and contracts that administer grant programs) awarded by USAID. Award documentation for such Federal financial assistance will include standard clauses that incorporate the standards of part 205 and USAID internal directives will highlight, explain, and incorporate part 205 by reference. The rule also proposes to make corresponding changes to existing parts 202, 211 and 226 of 22 CFR that relate to aspects of Federal financial assistance programs administered by USAID.

1. Participation by religious organizations in USAID programs. The proposed rule would make clear that organizations are eligible to participate in USAID programs without regard to their religious character or affiliation, and that organizations may not be excluded from the competition for USAID assistance awards or sub-awards simply because they are religious. Specifically, religious organizations are eligible to compete for funding on the same basis, and under the same eligibility requirements, as all other nonprofit organizations. The Federal government and intermediary organizations administering USAID funds are prohibited from discriminating for or against organizations on the basis of religious character or affiliation in the selection of service

providers. Nothing in this rule precludes those administering USAID funded programs from accommodating religious organizations in a manner consistent with the Religion Clauses of the First Amendment to the Constitution, as they have been interpreted to apply in the domestic context.

2. Inherently religious activities. The proposed rule describes the requirements applicable to all recipient and sub-recipient organizations regarding the use of USAID funds for inherently religious activities. Specifically, a participating organization may not use direct financial assistance¹ from USAID to support inherently religious activities, such as worship, religious instruction, or proselytization. If the organization engages in such activities, the activities must be offered separately, in time or location, from the programs or services funded with direct USAID assistance, and participation must be voluntary for the beneficiaries of the USAID-funded programs or services. This requirement ensures that direct financial assistance from USAID to religious organizations is not used to support inherently religious activities. Such assistance may not be used, for example, to conduct worship services, prayer meetings or any other activity that is inherently religious.

This restriction does not mean that an organization that receives USAID funds cannot engage in inherently religious activities. It simply means that such an organization cannot fund these activities with direct financial assistance from USAID.

Thus, faith-based organizations that receive direct financial assistance from USAID must

¹ As used in this proposed rule, the terms “direct USAID assistance” or “direct financial assistance from USAID” refers to direct funding within the meaning of the Establishment Clause of the First Amendment as it has been interpreted to apply in the domestic context. For example, direct USAID assistance may mean that the government or an intermediate organization with similar duties as a governmental entity under a particular USAID program selects an organization and enters a grant relationship with the organization for provision of needed services. In contrast, many indirect funding scenarios place the choice of service provider in the hands of a beneficiary, and then pay for the cost of that service through a voucher, certificate, or other similar means of payment.

take steps to separate, in time or location, their inherently religious activities from the direct USAID-funded services that they offer.

In addition, the proposed rule clarifies that the legal restrictions applicable to religious programs within correctional facilities will sometimes be different from the legal restrictions that apply to other USAID programs, on account of the fact that the degree of government control over correctional environments sometimes warrants affirmative steps by prison officials, in the form of chaplaincies and similar programs, to ensure that prisoners have access to opportunities to exercise their religion in the prison.

3. Independence of religious organizations. The proposed rule clarifies that a religious organization that participates in USAID programs will retain its independence and may continue to carry out its mission, including the definition, practice, and expression of its religious beliefs, provided that it does not use direct financial assistance from USAID to support any inherently religious activities, such as worship, religious instruction, or proselytization. Among other things, a faith-based organization may use space in its facilities to provide USAID-funded services, without removing religious art, icons, scriptures, or other religious symbols. In addition, a USAID-funded religious organization may retain religious terms in its organization's name, select its board members and otherwise govern itself on a religious basis, and include religious references in its organization's mission statements and other governing documents.

4. Use of USAID funds for acquisition, construction, or rehabilitation of structures. The proposed rule clarifies that USAID funds may be used for the acquisition, construction, or rehabilitation of structures only to the extent that those structures are

used for conducting eligible activities under the specific USAID program. Where a structure is used for both eligible and inherently religious activities, the proposed rule clarified that USAID funds may not exceed the cost of those portions of the acquisition, construction, or rehabilitation that are attributable to eligible activities. USAID funds may not be used for acquisition, construction, or rehabilitation of sanctuaries, chapels, or any other rooms that a religious congregation that is a recipient or sub-recipient of USAID assistance primarily uses as a place of worship.

5. Nondiscrimination in providing assistance. The proposed rule clarifies that an organization that receives direct financial assistance from USAID shall not, in providing program assistance, discriminate against a program beneficiary or potential program beneficiary on the basis of religion or religious belief. Accordingly, religious organizations, in providing services directly funded in whole or in part by USAID, may not discriminate against current or prospective program beneficiaries on the basis of religion or religious belief.

6. Assurance requirements. This rule proposes to direct the removal of those provisions of USAID's agreements, covenants, memoranda of understanding, policies, or regulations that require only USAID-funded religious organizations to provide assurances that they will not use monies or property for inherently religious activities. All organizations that participate in USAID programs, including religious ones, must carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of USAID-funded activities, including those prohibiting the use of direct financial assistance from USAID to engage in inherently religious activities. In addition, to the extent that provisions of USAID's agreements,

covenants, policies, or regulations disqualify religious organizations from participating in USAID's programs because they are motivated or influenced by religious faith to provide social services, or because of their religious character or affiliation, the proposed rule removes that restriction, which is not required by governing law.

7. National Security Waiver. The proposed rule also permits the Secretary of State to waive all or any part of the rule, on a case-by-case basis, where the Secretary determines that such waiver is necessary to further the national security or foreign policy interests of the United States.

III. Findings and Certifications

Executive Order 12866 - Regulatory Planning and Review

The Office of Management and Budget (OMB) reviewed this rule under Executive Order 12866, Regulatory Planning and Review. OMB determined that this rule is a "significant regulatory action" as defined in section 3(f) of the Order (although not an economically significant regulatory action under the Order) and, accordingly, has reviewed the rule.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on the private sector. This proposed rule does not impose any Federal mandates on any state, local, or tribal governments, or the private sector, within the meaning of the Unfunded Mandates Reform Act of 1995.

Regulatory Flexibility Act

The USAID Administrator, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed and approved this proposed rule and in so doing certifies that this rule will not have a significant economic impact on a substantial number of small entities. The proposed rule would not impose any new costs, or modify existing costs, applicable to USAID grantees. Rather, the purpose of the proposed rule is to remove prohibitions that currently restrict the equal participation of religious or religiously affiliated organizations (large and small) in USAID programs. Notwithstanding USAID's determination that this rule will not have a significant economic effect on a substantial number of small entities, USAID specifically invites comments regarding any less burdensome alternatives to this rule that will meet USAID's objectives as described in this preamble.

Catalog of Federal Domestic Assistance Numbers

The Catalog of Federal Domestic Assistance program numbers for the programs affected by this rule are 98.001, 98.002, 98.003, 98.004, 98.005, 98.006, 98.007, 98.008, 98.009.

List of Subjects

22 CFR Part 202

Foreign aid, grant programs, nonprofit organizations.

22 CFR Part 205

Foreign aid, grant programs, nonprofit organizations.

22 CFR Part 211

Agricultural commodities, disaster assistance, food assistance programs, foreign aid, grant programs, nonprofit organizations, reporting and recordkeeping requirements.

22 CFR Part 226

Accounting, colleges and universities, foreign aid, grant programs, hospitals, nonprofit organizations, reporting and recordkeeping requirements.

For the reasons stated in the preamble, USAID proposes to amend chapter II of Title 22 of the Code of Federal Regulations to read as follows:

PART 202 -- OVERSEAS SHIPMENT OF SUPPLIES BY NON-PROFIT RELIEF AGENCIES.

1. The authority citation for Part 202 revised to read as follows:

Authority: 22 U.S.C. 2381(a).

2. Add § 202.10 to read as follows:

§ 202.10 Participation by faith-based organizations.

The procedures established under this part shall be administered in compliance with the standards set forth in part 205, Participation by Religious Organizations in USAID Programs, of this chapter.

PART 205 -- PAYMENTS TO AND ON BEHALF OF PARTICIPANTS IN NONMILITARY ECONOMIC DEVELOPMENT TRAINING PROGRAMS

1. The authority citation for part 205 is revised to read as follows:

Authority: 22 U.S.C. 2381(a).

2. Revise Part 205 to read as follows:.

PART 205 -- PARTICIPATION BY RELIGIOUS ORGANIZATIONS IN USAID PROGRAMS

Authority: 22 U.S.C. 2381(a).

§ 205.1 Grants and cooperative agreements.

(a) Religious organizations are eligible, on the same basis as any other Organization to participate in any USAID program for which they are otherwise eligible. In the selection of service providers, neither USAID nor entities that make and administer sub-awards of USAID funds shall discriminate for or against an organization on the basis of the organization's religious character or affiliation. As used in this section, the term “program” refers to federally funded USAID grants and cooperative agreements, including sub-grants and sub-agreements. The term also includes grants awarded under contracts that have been awarded by USAID for the purpose of administering grant programs. As used in this section, the term “grantee” includes a recipient of a grant or a signatory to a cooperative agreement, as well as sub-recipients of USAID assistance under grants, cooperative agreements and contracts.

(b) Organizations that receive direct financial assistance from USAID under any USAID program may not engage in inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services directly funded with direct financial assistance from USAID. If an organization conducts such activities, the activities must be offered separately, in time or location, from the programs or services funded with direct financial assistance from USAID, and participation must

be voluntary for beneficiaries of the programs or services funded with such assistance.

These restrictions on inherently religious activities do not apply to programs where USAID funds are provided to chaplains to work with inmates in prisons, detention facilities, or community correction centers, or where USAID funds are provided to religious or other organizations for programs in prisons, detention facilities, or community correction centers, in which such organizations assist chaplains in carrying out their duties.

(c) A religious organization that participates in USAID-funded programs or services will retain its independence and may continue to carry out its mission, including the definition, practice, and expression of its religious beliefs, provided that it does not use direct financial assistance from USAID to support any inherently religious activities, such as worship, religious instruction, or proselytization. Among other things, a religious organization that receives financial assistance from USAID may use space in its facilities, without removing religious art, icons, scriptures, or other religious symbols. In addition, a religious organization that receives financial assistance from USAID retains its authority over its internal governance, and it may retain religious terms in its organization's name, select its board members on a religious basis, and include religious references in its organization's mission statements and other governing documents.

(d) USAID funds may not be used for the acquisition, construction, or rehabilitation of structures to the extent that those structures are used for inherently religious activities. USAID funds may be used for the acquisition, construction, or rehabilitation of structures only to the extent that those structures are used for conducting eligible activities under

this part. Where a structure is used for both eligible and inherently religious activities, USAID funds may not exceed the cost of those portions of the acquisition, construction, or rehabilitation that are attributable to eligible activities in accordance with the cost accounting requirements applicable to USAID funds in this part. Sanctuaries, chapels, or other rooms that a USAID-funded religious congregation primarily uses as a place of worship, however, are ineligible for USAID-funded improvements. Disposition of real property after the term of the grant, or any change in use of the property during the term of the grant, is subject to government-wide regulations governing real property disposition. (See 22 CFR Part 226).

(e) An organization that participates in programs funded by financial assistance from USAID shall not, in providing services, discriminate against a program beneficiary or potential program beneficiary on the basis of religion or religious belief.

(f) No grant document, contract, agreement, covenant, memorandum of understanding, policy, or regulation that is used by USAID shall require only religious organizations to provide assurances that they will not use monies or property for inherently religious activities. Any such restrictions shall apply equally to religious and secular organizations. All organizations that participate in USAID programs, including religious ones, must carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of USAID-funded activities, including those prohibiting the use of direct financial assistance from USAID to engage in inherently religious activities. No grant document, agreement, covenant, memorandum of understanding, policy, or regulation that is used by USAID shall disqualify religious organizations from participating in USAID's programs because such

organizations are motivated or influenced by religious faith to provide social services, or because of their religious character or affiliation.

(g) A religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in § 702(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1, is not forfeited when the organization receives financial assistance from USAID.

(h) Many USAID grant programs require an organization to be a “nonprofit organization” in order to be eligible for funding. Individual solicitations that require organizations to have nonprofit status will specifically so indicate in the eligibility section of a solicitation. Grantees should consult with the appropriate USAID program office to determine the scope of any applicable requirements. In USAID programs in which an applicant must show that it is a nonprofit organization, other than programs which are limited to registered Private and Voluntary Organizations, the applicant may do so by any of the following means:

(1) Proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code;

(2) A statement from a state taxing body or the state secretary of state certifying that:

(i) The organization is a nonprofit organization operating within the State;
and

(ii) No part of its net earnings may lawfully benefit any private shareholder or individual;

(3) A certified copy of the applicant's certificate of incorporation or similar document that clearly establishes the nonprofit status of the applicant; or

(4) Any item described in paragraphs (b)(1) through (3) of this section if that item applies to a state or national parent organization, together with a statement by the State or parent organization that the applicant is a local nonprofit affiliate.

(i) The Secretary of State may waive the requirements of this section in whole or in part, on a case-by-case basis, where the Secretary determines that such waiver is necessary to further the national security or foreign policy interests of the United States.

PART 211 – TRANSFER OF FOOD COMMODITIES FOR FOOD USE IN DISASTER RELIEF, ECONOMIC DEVELOPMENT, AND OTHER ASSISTANCE

1. The authority citation for Part 211 is revised to read as follows:

Authority: 7 U.S.C. 1726a(c).

2. Add § 211.13 to read as follows:

§ 211.13 Participation by religious organizations.

The funds provided under this part shall be administered in compliance with the standards set forth in part 205, Participation by Religious Organizations in USAID Programs, of this chapter.

PART 226 – ADMINISTRATION OF ASSISTANCE AWARDS TO U.S. NON- GOVERNMENTAL ORGANIZATIONS

1. The authority citation for part 205 is revised to read as follows:

Authority: 22 U.S.C. 2381(a).

2. Amend §226.1 to add the following text at the end of the section:

§226.1, Purpose and Applicability.

*** This part shall be administered in compliance with the standards set forth in part 205, Participation by Religious Organizations in USAID Programs, of this chapter.”

Date

Andrew S. Natsios
USAID Administrator